

## **CHAPTER 10 CUSTODY/VISITATION MEDIATION AND EVALUATIONS; VISITATION MONITORS**

It is recommended that prior to filing an OSC/motion to address disputed issues of child custody or visitation that the parties enroll in a parent education class or participate in family therapy to gain an understanding of the negative impact conflict has on children.

### **Rule 5.10.1**

#### **Mediation Required**

Before a hearing on any disputed issue of custody or visitation, the parties must participate in mediation either with a mediator at FCS of the Superior Court or a private mediator retained by the parties. The court may make temporary custody and/or visitation orders pending the hearing. Unless otherwise stipulated by the parties or ordered by the court, FCS mediation and private mediation in San Diego County is understood to be a non-confidential process which means that the information provided to the mediator is not confidential and if the parties do not reach an agreement through mediation, the mediator will submit a recommendation to the court with reasons for the recommendation. Upon a showing of good cause, the court may order that the parties and their minor children undergo a psychological evaluation or custody evaluation to assist in addressing any disputed issue of custody or visitation.

(Adopted 1/1/2005; Renum. 1/1/2006; Rev. 1/1/2008)

### **Rule 5.10.2**

#### **Mediation at FCS**

Except in cases where the parties stipulate or the court orders private mediation, all disputed custody or visitation matters must be mediated at FCS. Parties filing an OSC regarding custody and visitation earlier than six months following their last FCS mediation may appear before the court ex parte to request that the court re-refer the case to FCS. Absent a showing of good cause, the court will not set a new FCS mediation until at least six months have passed since the last such mediation. The locations and telephone numbers of FCS are on the San Diego Superior Court website ([www.sdcourt.ca.gov](http://www.sdcourt.ca.gov)).

##### **A. Initiating FCS Mediation.**

1. If unanticipated child custody or visitation issues are raised for the first time at a hearing, the court may make a temporary custody/visitation order and may order the parties to participate in FCS mediation. The parties must meet with an FCS mediator before the court will make final orders regarding a disputed custody/visitation issue.

2. The moving party must file a completed Family Court Services Screening Form (SDSC FCS-46) with the moving papers if custody/visitation is at issue. The business office will assign both a hearing date and an FCS appointment and insert both dates on the moving papers. Both parties are required to attend and participate in the FCS appointment.

##### **B. Resolution; Cancellation, or Rescheduling; Sanctions. Parties are encouraged to try to resolve child custody/visitation disputes before the mediation.**

1. If the disputed custody/visitation issue is resolved prior to the FCS mediation, the moving party/attorney must promptly notify the other party/attorney and call FCS to cancel the mediation.

2. **Cancellation.** Parties may cancel FCS mediation if the custody/visitation issue is dismissed or the parties choose to participate in private mediation prior to the FCS date. The requesting party must notify FCS of the cancellation at least two court days prior to the FCS mediation date.

3. **Rescheduling.** Parties may reschedule the FCS mediation one time by stipulation by giving notice to FCS at least two court days prior to the mediation date. Subsequent requests to reschedule mediation require court approval, and the requesting party must provide FCS with a copy of the court order granting the scheduling change.

4. **Sanctions.** Failure to cancel or reschedule mediation at least two court days before the mediation date or failure to attend and participate in the mediation may subject the offending party to monetary sanctions of up to \$1,500.

##### **C. Mediation Data Sheet**

1. At or before the FCS mediation, each party must submit a completed FCS Mediation Data Sheet to the FCS office. No attachments are permitted to the Mediation Data Sheet.

2. Parties appearing in FCS mediation by telephone must mail a completed FCS Mediation Data Sheet to the FCS office at least five calendar days before the mediation date.

**D. Writings and Other Materials for FCS Review; Notice.**

1. A party/attorney may provide FCS with writings and other materials including declarations, letters, or other documents for the mediator's review. FCS will only accept the writings and other materials if counsel/party does the following:

a. Serves the writings and other materials on the other party/attorney in accordance with subsections 2 and 3; or

b. Serves written notice on the other party/attorney listing the writings and other materials submitted to FCS in accordance with subsections 2 and 3; and

c. Provides FCS with a copy of the Proof of Service of the writings and other materials and the written notice prior to the start of the mediation session.

**2. Service by Moving Party on the Other Party/Attorney.** The following constitutes proper service by the moving party: if personally served, at least nine court days before the mediation conference, and if served by other means, the required nine court day period is increased in accordance with Code of Civil Procedure section 1005.

If the FCS mediation date is set 20 or fewer days from the filing of the OSC, the moving party may appear ex parte to request a shorter time for service.

**3. Service by Responding Party on the Other Party/Attorney.** The following constitutes proper service by the responding party: if personally served, at least two court days before the mediation conference, and if served by other means, the required two court day period is increased in accordance with Code of Civil Procedure section 1005.

**4. Expedited Mediation.** In the case of expedited mediation, there must be no writings or other materials submitted to FCS for the mediator's review absent court order.

**5. Documents Requested by FCS.** FCS may request the parties submit additional documents for consideration. Copies of the documents must be provided to the other party concurrently with the submission to FCS.

**E. Attendance at Mediation.** Other than a statutorily authorized support person, only the parties may attend the mediation. The attorneys do not participate in the FCS mediation. If the mediator wants to interview the child or other person(s), the mediator will arrange for such interviews.

**F. Telephone Conference.** If an in-person meeting with a mediator at FCS is not feasible, such as when one party resides outside the County of San Diego, mediation will be conducted by telephone with that party. The party appearing telephonically must call FCS to obtain an FCS Mediation Data Sheet for submission to FCS in accordance with subsection C above. The party appearing telephonically shall call FCS at the time designated for the mediation.

**G. Agreements Reached in Mediation.** If the parties reach an agreement during mediation, the mediator will prepare a written agreement, approved and signed by the parties, and file it with the court.

**H. Unresolved Issues in Mediation.** If the parties are unable to resolve issues of custody or visitation through mediation, the FCS mediator will submit a written recommendation with reasons for the recommendation to the parties, their attorneys and the court before the custody hearing. If the FCS recommendation is not available at least 10 calendar days before the hearing, the court will generally grant a continuance upon a party's request.

**I. Cross Examination of FCS Mediator.** A party has the right to cross-examine the FCS mediator at trial or special set hearing. FCS mediators are employees of the Superior Court. A party desiring the testimony of a FCS mediator at trial or special set hearing should first contact FCS to determine availability on the desired date. A subpoena must then be served on FCS at least 10 days in advance of the hearing with fees deposited as required by Government Code sections 68097, 68097.1, and 68097.2. The court will not authorize depositions of mediators absent a showing of extraordinary good cause, such as prolonged unavailability of the mediator on or about the time of trial. Certain privileges attach to FCS files. Judicial officers will not order the release of any FCS documents without a prior in-camera review. A party desiring an in-camera review shall serve a subpoena duces tecum upon FCS for the file/documents at least 15 days before the trial or special set hearing, and if an objection is received, must schedule a motion to compel or Order to Show Cause to obtain the in camera review.

**J. Communication with FCS.** Communications between mediators, parties, attorneys, including minors' counsel, are governed by Family Code sections 216 and 1818.

**K. Request for Change of Mediator.**

**1. Perceived Bias of Mediator.** Should a party believe that a particular mediator is biased in a way that affects the fair and equal treatment, the party may bring this matter to the attention of the Director of FCS for consideration of this perception and assignment to a different mediator.

**2. Procedure for Change of Mediator.** A peremptory challenge of a mediator is not allowed. However, a party may request a change of mediator by following these rules.

**a. During Mediation.** A party must request a change of mediator as soon as sufficient basis for a change is known. No request to change a mediator will be granted unless there is a demonstrable showing of bias or prejudice against one of the parties or their attorney such that an independent, fair, and impartial recommendation cannot be made to the court.

**b. Subsequent Court Proceedings.** If either party files a subsequent court proceeding requiring FCS mediation, either party may, at the time of the assignment, request a different mediator, without a showing of good cause.

(Adopted 1/1/2005; Rev. & Renum. 1/1/2006; Rev. 1/1/2007; Rev. & Renum. 1/1/2008; Rev. 1/1/2009)

### **Rule 5.10.3**

#### **Private Mediation**

##### **A. Initiating the Private Mediation.**

**1.** The parties may stipulate that the issues of custody and visitation be referred for private mediation prior to FCS mediation or in addition to other recommendations made by FCS or an evaluator.

**2.** The court may order private mediation upon the request of either party.

**B. Scope of the Mediation.** A formal order must be prepared setting forth the scope of the mediation; identifying the mediator; setting forth the payment plan for the mediator's services; setting forth whether the mediation is confidential or non-confidential; and such other matters as the court deems appropriate. Conformed copies of the order must be provided to the mediator and all parties/attorneys.

**C. Mediator Qualifications.** Mediators must meet the qualifications, training and continuing education requirements of Family Code sections 1815 and 1816, and will be required to acknowledge that they are so qualified and trained.

##### **D. Writings and Other Materials for Mediator's Review; Notice**

**1.** A party/attorney may provide the mediator with writings and other materials including declarations, letters, or other documents for the mediator's review. The mediator will not accept the writings and other materials unless the party/attorney does the following:

**a.** Serves the writings and other materials on the other party/attorney in accordance with subsections 2 and 3; or

**b.** Serves written notice to the other party/attorney listing the writings and other materials submitted to the mediator in accordance with subsections 2 and 3; and

**c.** Provides the mediator with a copy of the Proof of Service of the writings and other materials and the written notice prior to the start of the mediation session.

**2. Service by Moving Party on the Other Party/Attorney.** The following constitutes proper service by the moving party: if personally served, at least nine court days before the mediation conference, and if served by mail, the required nine court day period is increased in accordance with Code of Civil Procedure section 1005.

**3. Service by Responding Party on the Other Party/Attorney.** The following constitutes proper service by the responding party: if personally served, at least two court days before the mediation conference, and if served by mail, the required two court day period is increased in accordance with Code of Civil Procedure section 1005.

**4. Documents Requested by the Mediator.** The mediator may request the parties submit additional documents for consideration. Copies of the documents must be provided to the other party concurrently with the submission to the mediator.

**E. Attendance at Mediation.** Unless otherwise stipulated, only the parties and statutorily authorized support persons may attend the mediation. The attorneys do not participate in the mediation. If the mediator wants to interview the children or other person(s), the mediator will arrange for such interviews.

**F. Agreements Reached in Mediation.** If the parties reach an agreement during mediation, the mediator will prepare a report setting forth the terms of the agreement. If the mediation was non-confidential, either party or the mediator may file the report with the court.

##### **G. Unresolved Issues in Mediation.**

**1. Confidential Private Mediation.** If the parties are unable to resolve issues of custody or visitation through private mediation and the parties stipulated to participate in confidential private mediation, the parties must participate in non-confidential private mediation or schedule and participate in FCS mediation before the matter is heard by the court.

**2. Non-confidential Private Mediation.** If the parties are unable to resolve issues of custody or visitation through non-confidential private mediation, the mediator will submit a written report with a recommendation and reasons for the recommendation to the parties, their attorneys and the court before the custody hearing. If the report is not available at least 10 calendar days before the hearing, the court may grant a continuance upon request of a party. The written recommendation and report of the mediator will be admitted without further foundation.

**H. Cross-Examination of the Mediator.** A party has the right to cross-examine the mediator at trial or special set hearing. Either party may call the mediator, upon reasonable notice, to examine the mediator on the report and/or the recommendations at the special set hearing/trial.

**I. Communication with the Mediator.** Communications between mediators, parties, and attorneys, including minors' counsel, shall be governed by the provisions of Family Code sections 216 and 1818.

(Adopted 1/1/2008)

#### **Rule 5.10.4**

##### **Custody Evaluations**

A custody evaluation is a process by which a mental health professional uses appropriate professional techniques to gather information to formulate a custody/visitation recommendation that is submitted to the court pursuant to California Rules of Court, rule 5.220.

##### **A. Initiating the Evaluation.**

1. The court on its own motion or upon the request of either party may order an evaluation.

2. The parties may stipulate that the issues of custody and visitation be referred for an evaluation prior to or in addition to other recommendations made by FCS.

3. An evaluation may be recommended by FCS following mediation.

##### **B. Scope of the Evaluation.**

1. A formal order must be prepared that specifies: the appointment of the evaluator under Evidence Code section 730, Family Code section 3110, or Code of Civil Procedure 2032; the purpose and scope of the evaluation; the referring issues or questions; the evaluator; and such other matters as the court deems appropriate. Conformed copies of the order must be provided to the evaluator and all parties/attorneys.

2. Nothing herein may be construed to prevent the evaluator from contacting all attorneys and/or parties when it appears to the evaluator that new and/or additional information is being provided which causes the evaluator to recommend additional issues for evaluation.

##### **C. Evaluator Qualifications; Selection of Evaluator; Request for Change of Evaluator; Withdrawal by an Evaluator.**

1. **Qualifications.** Evaluators must meet the qualifications, training and continuing education requirements of Family Code sections 1815, 1816, and 3111 and California Rules of Court, rule 5.220(g), and will be required to acknowledge that they are so qualified and trained. Evaluators appointed pursuant to Evidence Code section 730 (Appointment of Expert by Court) under this rule are protected under Civil Code section 47 (Privileged Publications or Broadcasts) acting in the proper discharge of their official duty as appointed by this court for communications made and will be granted immunity from prosecution so long as the evaluator is acting within the judicial proceedings, for the appointment, or in any other official proceedings authorized by the court or law to achieve the objects of the litigation and in connection with or in a manner logically related to the litigation and the underlying action.

2. **Selection.** The parties may stipulate to the selection of an evaluator subject to the evaluator being approved by the court, or the court may appoint an evaluator.

3. **Requests for Change.** Requests for a change of evaluator must be made as soon as practicable and based upon good cause. The court will consider the basis and timeliness of the request upon an ex parte application.

4. Evaluators may petition the court to withdraw from a case, for good cause, in a writing directed to the judicial officer to whom the case has been assigned with copies to parties/attorneys. The evaluator need not be present at the hearing unless directed by the court. Any complaints regarding the evaluator will be directed to the appropriate licensing/regulatory board.

**D. Writings and Other Materials for the Evaluator's Review.** If either party/attorney wishes to submit writings or other materials to an evaluator for consideration during evaluation, he or she must submit the information to the evaluator with a cover letter describing or itemizing the materials provided. The cover letter must clearly state that the information has also been sent to the opposing party/attorney

using the same method of delivery as was used for the evaluator (i.e. mail/hand delivery/fax, etc). The evaluator will not review the writings and other materials unless it has been sent to the opposing party/attorney. If the writings and other materials is a tape recording, video cassette, movie film, personal diary, or journal of the other party, that material must be delivered to the opposing party/attorney at least seven calendar days before submitting the item to the evaluator. If the material is an audio recording, it must be accompanied by a written transcript of the recording. The evaluator must immediately return any submitted writings and other materials that were not sent to the opposing party/attorney in accordance with this section.

**E. Report of the Evaluator.** The evaluator's report and recommendation will be released simultaneously to the parties/attorneys. The evaluator's report and recommendation will be filed with the court and admitted without further foundation. Either party may call the evaluator, upon reasonable notice, to examine the evaluator on the report and/or the recommendations at the hearing/trial.

**F. Communication with the Evaluator.** Communications between evaluators, parties, and/or attorneys, including minors' counsel, is governed by Family Code sections 216 and 1818.

(Adopted 1/1/2005; Renum. 1/1/2006; Rev. 1/1/2007; Rev. 1/1/2008)

### **Rule 5.10.5**

#### **Confidentiality of Reports and Recommendations**

##### **A. Court Files.**

1. All custody evaluator's reports and recommendations and other mental health professional's reports submitted to the court are confidential and will be placed in the confidential section of the court file. These reports and recommendations are available only to the court or persons to whom the court expressly grants access by written order made with prior notice to all parties.

2. All FCS and private mediation reports and recommendations submitted to the court are confidential and will be placed in the confidential section of the court file. These reports and recommendations are available only to the court, the parties, their attorneys, FCS, the court facilitators, and persons to whom the court expressly grants access by written order made with prior notice to all parties.

**B. Confidentiality of Reports.** Reports usually contain very sensitive information and must not be used to cause unnecessary embarrassment or harm to the parties and must be handled in a responsible, confidential manner for purposes limited to the custody proceeding.

1. **Custody Evaluation Reports.** Absent a court order to the contrary, minors must not have access to the evaluation report. Anyone receiving the evaluator's report must not give copies, or parts, of the report to anyone who is not assisting in the preparation of the case.

2. **FCS/Private Mediation Reports.** Minors must not have access to the report. The report must not be given to anyone who is not participating in the custody proceeding. Reports may be provided to the individual therapist of a party or child to assist in the therapy.

(Adopted 1/1/2008)

### **Rule 5.10.6**

#### **Visitation Monitors**

**A. Purpose.** The purpose of a visitation monitor is to provide a safe and nurturing environment for children, during a parent's visitation, where there is need for reunification, alleged/adjudicated emotional, physical or sexual abuse of the child by a parent, or threat of abduction.

**B. Visitation Monitor List.** A list of visitation monitors is available through the San Diego Superior Court - Programs Resource List (PRL). The individuals/entities have identified themselves to the San Diego Superior Court as visitation monitors. The visitation monitors are not affiliated with the court, and each visitation monitor is independently responsible for compliance with any and all applicable legal requirements. The court does not endorse, evaluate, supervise, or monitor the visitation monitors.

**C. Visitation Monitor Requirements.** Providers of supervised visitation, whether the provider is a friend, relative, paid independent contractor, employee, intern, or volunteer operating independently or through a supervised visitation center or agency are required to follow the legal requirements and obligations set forth in California Rules of Court, Judicial Administrative Standard 5.20. Informational materials about the role of a provider, the terms and conditions of supervised visitation, and the legal responsibilities and obligations of a provider are available at all FCS locations.

**D. Non-Professional Visitation Monitors.** A non-professional visitation monitor is defined as any person who is not paid for providing supervised visitation services. Prior to supervising any visitation, the non-professional visitation monitor must complete and file with the court a Non-Professional Visitation

Monitor Declaration available on the court's website at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov) under the "Family Law" forms.

**E. Grievance Against PRL Visitation Monitor.** A party/attorney may file a grievance against the visitation monitor. The grievance must be submitted in writing to the Supervising Judge of the Family Court. The Supervising Judge will forward the grievance to the Presiding Judge of the San Diego Superior Court or his or her designee for review.

**F. Removal From PRL Visitation Monitor List.** Removal from the PRL list may be made without cause, notice, or explanation. If practical, written notification of removal will be provided.  
(Adopted 1/1/2008; Rev. 1/1/2009)